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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ELLO,

Plaintiff,

V.

ISHRI SINGH, et al.,

Defendants.

Case No. 05 CV 9625 (KMK)

(ECF Case)

DECLARATION OF
RORY J. ALBERT

RORY J. ALBERT declares under the penalties of perjury:

1. I am a member of Proskauer Rose LLP (“Proskauer”), counsel to Defendants Ishry Singh, Laborers-Employers Cooperation and Education Trust Fund (“LECET”), Mason Tenders’ District Council Trust Funds (“MTDC Funds”), Raymond Pocino, as a Trustee of the MTDC Funds, and John Virga, MTDC Funds’ Director (collectively, the “Fund Defendants”) in the above-captioned action. I submit this declaration based on my personal knowledge in opposition to Plaintiff Richard Ello’s application to disqualify Proskauer as counsel for the Fund Defendants and, specifically, to address those arguments in Plaintiff’s application which raise issues regarding the nature of Proskauer’s work for the MTDC Funds and related entities.

2. Proskauer was appointed as counsel to the MTDC Funds in April 1995 in consultation with, and subject to the approval of, a Court-appointed monitor who, at the time, was overseeing the affairs of the MTDC Funds, in the aftermath of a governmental investigation

and lawsuit that exposed organized crime infiltration of the MTDC Funds and massive MTDC Funds losses. I am, and have always been, the responsible partner for this client and related entities referred to herein and in Plaintiff's application, which means that, in addition to providing substantive advice in my area of expertise (namely employee benefit matters), I am also the partner who assigns to other Proskauer lawyers responsibility for advising these entities.

3. At the time Proskauer was appointed as counsel to the MTDC Funds, the trustees of the MTDC Funds were David Elbaor, Steven Hammond, Paul O'Brien, and Sheldon Lipsett. Plaintiff replaced David Elbaor as a trustee in August 1996.

4. Although Proskauer has consistently represented the MTDC Funds since April 1995, the nature of that representation has evolved and grown to become increasingly multifaceted. Although it would be impracticable – and an unwarranted waiver of attorney-client privilege – to identify with specificity the nature of all advice given, the areas on which the firm has advised the MTDC Funds can be broadly grouped into the following five (5) categories:

a. **Legal compliance in employee benefit fund administration:** This category includes (a) amending and restating plan documentation to ensure continued compliance with the Internal Revenue Code of 1986, as amended (the "Code") and ERISA; (b) assisting the Funds in connection with their compliance with ERISA's reporting and disclosure requirements and other legal obligations (such as those arising under the Code, HIPAA, COBRA and other laws affecting employee benefit plans); (c) communicating with government agencies in connection with routine plan audits and required government filings; (d) interacting with other MTDC Funds' professionals (*e.g.*, investment advisors, accountants, and actuaries regarding various Funds matters, including investment issues); (e) negotiating various written agreements with the MTDC Funds' service providers, such as investment

managers and third party administrators of welfare benefits; and (f) attending periodic Trustee meetings;

b. **Participant claims:** This includes (a) advising the MTDC Funds' Director and the Board of Trustees on the procedures for considering and determining claims and appeals filed by MTDC Funds' participants and advising on any legal issues engendered by such claims and appeals; and (b) defending claims in litigation, *see, e.g., Candela v. Mason Tenders' District Council Welfare Fund and the Trustees of the Mason Tenders' District Council Welfare Fund*, 04 CV 00513 (claim by participant under ERISA for retiree medical benefits); *Campanella v. Mason Tenders' District Council Pension Plan and the Board of Trustees of the Mason Tenders' District Council Pension Plan*, 02 CV 00032 (claim by participant under ERISA for increased pension benefits and statutory penalties for allegedly failing to comply with reporting and disclosure requirements); *Wilkins v. Mason Tenders' District Council Pension Fund and the Trustees of the Mason Tenders' District Council Pension Fund*, 03 CV 1581 (claim by participant under ERISA seeking increased pension benefits).

c. **Audit and Delinquency Matters:** As co-counsel responsible for collecting delinquent contributions from employers participating in the MTDC Funds, Proskauer commences and prosecutes actions against delinquent employers, regularly prepares reports identifying the status of such litigations and amounts due and recovered, and advises the MTDC Funds' Audit and Delinquency Committee in connection with such matters.

d. **Litigation Matters:** When Proskauer was first appointed as counsel to the MTDC Funds in 1995, the focus of the firm's litigation work was on commencing lawsuits on behalf of the MTDC Funds to seek recovery of losses from former trustees and service providers believed to have misappropriated and misused fund assets in breach of their legal

obligations. More recently, the litigations in which Proskauer has represented the MTDC Funds have involved claims by participants seeking benefits under the MTDC Funds. (*See* paragraph 4(b) above).

e. **Employment Advice:** Given that the MTDC Funds necessarily employ staff to carry out the day-to-day administration of the MTDC Funds, Proskauer has provided the MTDC Funds advice regarding workplace issues, including advice and training regarding discrimination and harassment. Proskauer has also represented the Mason Tenders District Council Training Fund in proceedings before the National Labor Relations Board and the Equal Employment Opportunity Commission.

5. In or about August 1997, Proskauer was appointed as counsel to the Demolition Workers Union Local 95 Trust Funds (the "Local 95 Funds").

6. Since the firm's appointment as counsel to the Local 95 Funds, we have represented these funds in the same types of matters described above in paragraphs 4(a) through (c).

7. In his application for disqualification, Plaintiff states that he was deposed in connection with a litigation commenced by the Local 95 Funds against contributing employer Mackroyce Contracting Corp. (Affirmation of Ruth Pollack ("Pollack Aff.") at ¶ 8) If Plaintiff is referring to a deposition he gave in February 1999, Plaintiff gave that deposition, not as a trustee of the Local 95 Funds, but rather as a non-party witness. Moreover, he was defended by Barbara Mehlsack, Esq. of the firm of Gorlick, Kravitz & Listhaus at the deposition, not Proskauer. (*See* excerpts of the February 26, 1999 deposition of Richard Ello, attached hereto as Exhibit A). Regardless, the deposition related to an action to collect delinquent contributions.

8. In or about March 1998, Proskauer was appointed as counsel to the Recycling and General Industrial Union Local 108 Pension and Welfare Funds (the "Local 108 Funds"). The work carried out for the Local 108 Funds was in the categories described above in paragraphs 4(a) through 4(c).

9. Although Plaintiff has contended that Proskauer was discharged by the Local 108 Funds because of its fees, the communications I received suggest otherwise. One of the trustees, Michael Hellstrom, repeatedly voiced his perception of Proskauer as a management-side firm and, as an official of Local Union No. 108, he did not think that Proskauer should be advising an employee benefit fund in which Local Union No. 108 members participated. It is my understanding that it was this view that led to the firm being removed as counsel to the Local 108 Funds.

10. In or about December 1997, Proskauer was retained by the trustees of the Plasterers Helpers' Local 30 Trust Funds (the "Local 30 Funds") to work with a Court-appointed monitor and Investigations Officer in conducting an investigation into the actions of the former Local 30 Funds trustees and administration. Proskauer's work for the Local 30 Funds came to an end at the completion of that investigation.

11. Proskauer was retained to represent the Mason Tenders District Council of Greater New York (the "Union") in a lawsuit filed against the Union by the New York State Laborers Political Action Committee. *See New York State Laborers Political Action Committee, Samuel M. Freisna, Chairman v. Mason Tenders District Council of New York*, 97 Civ. 1731 (NPM/DRH). However, contrary to Plaintiff's suggestion (Pollack Aff. at ¶ 8), Plaintiff was not named as a defendant in that lawsuit.

12. Additionally, in 1999, the firm was retained to represent one of the Union's constituent locals, the Construction and General Building Laborers Local 79 in the action captioned *Christina Marie Cabrera v. Construction and General Building Laborers Local 79, William Schmidt, and Daniel Kearney*, Index No. 99/601907, which alleged certain claims of sexual harassment. Plaintiff was not among the defendants named in the action.

13. Proskauer commenced its representation of LECET in March 2005, after Plaintiff had already resigned as LECET Director. All dealings with LECET have been through its current Director and Administrator, Chris J. Columbia.

Dated: New York, New York
January 31, 2006

/s/ Rory J. Albert
RORY J. ALBERT

**Exhibit A to Declaration of
Rory J. Albert, Esq.**

1
2
3 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 DEMOLITION WORKERS UNION, LOCAL 95
6 INSURANCE, ANNUITY AND PENSION FUNDS,
by their Trustees, CHRISTINE McKENNA,
7 PHILLIP CHILLAK, SR., KENNETH FROLICH
and ANTHONY NOTO,

8 Plaintiffs,

9 -against-

10 MACKROYCE CONTRACTING CORP., MACKROYCE
DISMANTLING, LTD.,

11 Defendants.
12 -----X

13 570 Lexington Avenue
14 New York, New York

15 February 26, 1999
16 1:30 p.m.

17 EXAMINATION BEFORE TRIAL of RICHARD ELLO, a
18 Non-Party witness herein, taken by the Defendants,
19 pursuant to Subpoena.
20
21
22

23 ARISTA COURT REPORTING CO.
24 277 Broadway
New York, N.Y. 10007
25 (212) 732-6190

-----X
MACKROYCE CONTRACTING CORP., MACKROYCE
DISMANTLING, LTD.,

Third-Party Plaintiffs,

-against-

MASON TENDERS DISTRICT COUNCIL WELFARE
FUND, PENSION FUND and ANNUITY FUND,
ASBESTOS TRAINING PROGRAM FUND,
INDUSTRY FUND, LEGAL SERVICES,

Third-Party Defendants.

-----X
A P P E A R A N C E S :

PROSKAUER ROSE, LLP
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BY: JOHN E. DALY, ESQ., of Counsel

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GORLICK, KRAVITZ & LISTHAUS, P.C.
Attorneys for Third-Party Defendants
17 State Street
New York, New York 10004-1501
BY: BARBARA S. MEHLSACK, ESQ., of Counsel

* * *

1
2 IT IS HEREBY STIPULATED AND AGREED by and
3 between the attorneys for the respective parties hereto
4 that the sealing and filing of the transcript of the
5 within Examination Before Trial be, and the same hereby
6 are waived; and that said transcript may be signed and
7 sworn to before any Notary Public or Commissioner of
8 Deeds with the same force and effect as if signed and
9 sworn to before an officer of this Court.

10 IT IS FURTHER STIPULATED AND AGREED that all
11 objections, except as to the form of the questions, are
12 reserved to the time of the trial.

13 IT IS FURTHER STIPULATED AND AGREED between the
14 attorneys for the respective parties hereto that a copy
15 of this examination shall be furnished to the attorneys
16 for the Third-Party Defendants, without charge.

17
18 * * *

19
20
21 R I C H A R D E L L O, a witness herein, with an office
22 address of 32 West 18th Street, New York, New York
23 10011-4612, after having been first duly sworn by a
24 Notary Public of the State of New York, testified as
25 follows:

1 Ello

2 EXAMINATION BY MR. COREN:

3 Q Please state your name for the record.

4 A Richard Ello.

5 Q Please state your address for the record.

6 A 32 West 18th Street, New York, New York

7 10011-4612.

8 Q Good afternoon.

9 A Hi.

10 Q I will be asking you a series of questions and
11 if you do not understand, please let me know. If there
12 is an objection by counsel, please wait until we get it
13 straightened out. If the question is confusing, let me
14 know and we will see what we can do about rephrasing it.
15 If you need to take a break at any time we will see what
16 we can do about accommodating you.

17 MS. MEHLSACK: Counsel, before you start, I
18 would like to place an objection on the record and
19 that is to the relevancy of the two lines of
20 questioning that you had notified us that you were
21 going to be questioning the client about. We have --
22 no timely subpoena was received by my client -- no
23 subpoena at all was received by my client and we got
24 a copy of the subpoena and notice of deposition at
25 two minutes to six on Wednesday evening and as we

1 Ello

2 wrote you on Thursday, we understood that the two
3 lines of inquiry were going to be with respect to the
4 effective date of the contract and jurisdictional
5 coverage of the contract.

6 With respect to the effective date, we believe
7 that there is no matter that is material to this
8 litigation because -- and that your client has
9 already conceded to that by admitting -- not
10 answering to a coverage period of 1995 to 1997; and
11 with respect to the jurisdictional issue, based on
12 your client's documents that were produced to the
13 auditor, there is no evidence that even if there is a
14 basis for the factorial jurisdictional issue, there
15 has not been forthcoming from your client any
16 evidence to indicate that any New Jersey workers were
17 picked up by an audit once against the collective
18 bargaining agreement and entirely.

19 MR. COREN: Counsel --

20 MS. MEHLSACK: May I finish?

21 MR. COREN: Whose part are you speaking --

22 MS. MEHLSACK: Local 95.

23 MR. COREN: Not on the third-party defendants.

24 MS. MEHLSACK: I speak on my client's --

25 MR. COREN: Perhaps I can object at that point

1 Ello .

2 rather than anticipating --

3 MS. MEHLSACK: I would like to put you on
4 notice, Counselor that we are reserving the right to
5 seek all the costs of this subpoena and deposition on
6 behalf of Local 95, including our attorney's fees.

7 MR. COREN: Thank you.

8 MR. DALY: On behalf of the plaintiffs,
9 briefly, that with respect to the subpoena, we also
10 notified you yesterday that we object to the Form 67
11 of the subpoena and we also expect that the areas of
12 questioning will be restricted to the two areas of
13 questioning that were indicated in your September 24,
14 1998 letter to Judge McKenna.

15 Q Mr. Ello, can you tell me, are you affiliated
16 in any way with Demolition Workers Union Local 95?

17 A Yes, I am.

18 Q In what way are you affiliated with them?

19 A I'm currently serving as deputy trustee.

20 Q What is the area of your authority or
21 jurisdiction?

22 A Along with the regular trustee duties, we've
23 been overseeing the day-to-day operations of the local
24 union since it was placed in trusteeship.

25 Q When would that be?

1 Ello

2 copy of that document to me.

3 MS. MEHLSACK: Counselor, it is my
4 understanding, I could be wrong, that your client has
5 been in possession of that document since the NLRB
6 litigation back in June of 1996.

7 MR. COREN: That is not relevant to this
8 question. I am entitled to have that document within
9 the context of this litigation.

10 MS. MEHLSACK: We are at this point --

11 MR. COREN: I am not sure that my client even
12 has such a document.

13 MS. MEHLSACK: We agreed we will waive all
14 objections except as to form, but I told you that
15 this line of questioning is entirely irrelevant and
16 the document is entirely irrelevant.

17 MR. COREN: You are not talking as a party,
18 Counsel --

19 MS. MEHLSACK: I am talking as counsel to my
20 client.

21 MR. COREN: The relevancy as to --

22 MS. MEHLSACK: Whether or not -- you do not
23 have a right to examine my client as to what the
24 color of his house is.

25 MR. COREN: Counsel, please, I am not talking

1 Ello

2 June 30, 1997?

3 MS. MEHLSACK: Objection as to form. In what
4 context?

5 MR. COREN: I am asking if he has reviewed it.
6 It does not matter in what context.

7 A I probably have.

8 Q In the course of that review, did you take
9 notice of the geographic jurisdiction stated in the
10 collective bargaining agreement between Mackroyce and
11 Local 95 for the period July 1, '93 to June 30, 1997?

12 A I don't recall specifically.

13 Q Do you recall whether or not you testified at
14 the NLRB as to the jurisdiction of Local 95 as far as it
15 is expressed in the agreement between Mackroyce and Local
16 95?

17 MR. DALY: Objection as to form.

18 MS. MEHLSACK: Objection as to form.

19 Q When was the last time you had occasion to
20 review the collective bargaining agreement for the period
21 of '93 to '97 between Local 95 and Mackroyce?

22 MR. DALY: I would put on the record, I advise
23 the witness not to answer as to -- with respect to
24 any review that may have been done in preparation on
25 the basis of privilege, but outside of that, you can

1 Ello

2 distinct items and --

3 MR. COREN: That is --

4 MS. MEHLSACK: And you informed Judge McKenna
5 that you wanted to, as I said, get additional
6 discovery on geographic jurisdiction and on the
7 effective date of contract. Your questions have
8 nothing to do with geographic jurisdiction and,
9 Counsel, once again, to the extent that you are
10 taking up my client's time and taking up our time, my
11 time, the firm's time, that he has to pay for this
12 deposition, I am seeking costs because you are going
13 way beyond what you told Judge McKenna you were
14 interested in.

15 MR. DALY: Same objection on behalf of
16 plaintiffs.

17 MR. COREN: To the extent that you have made
18 routine objections and wasting my time, we may seek
19 costs from you, and my client --

20 MS. MEHLSACK: I will cease to give you notice
21 of that. We will consider that you were under notice
22 for this entire deposition, that you have gone on
23 with this line of questioning, you have engaged in
24 matters entirely irrelevant to the litigation and
25 have gone beyond even matters that you asked Judge

1 Ello

2 McKenna for discovery.

3 MR. COREN: Your position today is as
4 representative of a non-party. The question of
5 relevancy does not come up.

6 MR. DALY: Well --

7 MS. MEHLSACK: First of all, Counsel, I am here
8 as a third-party defendant counsel but that is not
9 the case, Counsel. If you are requiring my client to
10 pay attorney's fees and taking up his time on other
11 matters irrelevant to a litigation, that --

12 MR. COREN: But --

13 MS. MEHLSACK: Excuse me. (Continuing) -- who
14 is also a member of the bar, that is very much the
15 issue that is of concern to me and to my client, and
16 that said, you are now on notice and I do not see any
17 reason -- if you consider this a waste of time, I
18 would not put you on notice any further.

19 MR. DALY: I would also like to put my
20 objection on the record on behalf of the plaintiffs
21 that your subpoena -- according to your subpoena, you
22 subpoenaed in part Local 95, purports to be a Rule
23 30b6 deposition did not include -- the subpoena does
24 not include the areas of questioning as required by
25 the rule and we are here completely voluntarily. As

1 Ello

2 although I do represent the party that filed the
3 answer and to the extent that the litigation is
4 proving that there are other issues arising, I will
5 seek to amend the answer. If you are telling me that
6 your witness is being directed not to answer related
7 to trade jurisdiction, let me know and we will deal
8 with it.

9 MS. MEHLSACK: All I said is that I am putting
10 you on notice, that we have an objection and that we
11 are here as entirely voluntarily.

12 MR. COREN: And I appreciate your courtesy.

13 MS. MEHLSACK: And in addition to that, with
14 respect to even the questions, the issues that you
15 raised to Judge McKenna, we believe that there is no
16 basis for this deposition, but at the moment I am not
17 directing my client not to answer. I was asking you
18 how these questions are relevant to the defenses and
19 I was simply asking you to point out the relevancy of
20 the defenses. The document speaks for itself.

21 MR. COREN: Thank you. I do not think on the
22 record of this deposition it is appropriate for me to
23 respond to that inquiry.

24 Counsel, could I just have a few minutes.

25 MR. DALY: Sure.